

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Sawyer, PJ and Murphy and Fitzgerald, JJ

BLAKEWOODS SURGERY CENTER, L.L.C.,
JACKSON MEDICAL SERVICES, INC., PAUL
ERNEST, M.D., KEVIN LAVERY, M.D.
ANTHONY SENSOLI, M.D., SIGMUND
ANCEREWICZ, M.D., KHAWAJA IKRAM, D.O.,
SHARON ROONEY-GANDY, D.D., ARTHUR
WIERENGA, M.D., MARTIN PATRIAS, M.D.
MICHAEL CHAMES, M.D., GHULUM DASTGIR,
M.D., AND KABINDRA MISHRA, M.D.

Supreme Court No. 118935

Court of Appeals No. 221494

Circuit Court No. 98-88770-CZ

Plaintiffs-Appellants,

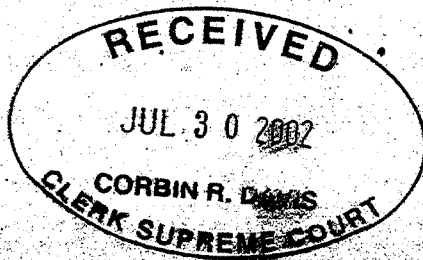
v

COMMISSIONER OF FINANCIAL AND
INSURANCE SERVICES, IN HIS OFFICIAL
CAPACITY,

Defendant-Appellee.

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED



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QUESTIONS PRESENTED FOR REVIEW

- I. MCL 550.1105(4), 550.1107(1), 550.1502(3) and 550.1502(8) allow Blue Cross Blue Shield of Michigan to set uniform, reasonable standards to apply to those providers who wish to enter into a participating agreement with Blue Cross Blue Shield. May Blue Cross Blue Shield have an "evidence of need" or "evidence of necessity" standard in its Ambulatory Surgery Facilities Provider Class Plan?**
- II. The Appellants sought a Declaratory Judgment. In order for the Trial Court to grant a Declaratory Judgment, there must be an actual controversy. An actual controversy exists only if a Declaratory Judgment is necessary to guide a litigant's future conduct in order to preserve its legal rights. MCL 550.1509 provided an administrative remedy which preserved the Appellants' legal rights. Did an actual controversy exist?**
- III. The Appellants sought mandamus. The Commissioner did not have a clear legal duty to perform the act requested and the Appellants did not have a clear legal right to performance of the specific act. Was the Court of Appeals correct when it affirmed the denial of mandamus which requested the Court to order the Commissioner to enjoin Blue Cross Blue Shield of Michigan from using evidence of need criteria in its Ambulatory Surgery Facilities Provider Class Plan and from taking other alleged ultra vires actions?**
- IV. In paragraphs C and E of their requested relief, the Appellants request this Court to require the Commissioner to prohibit Blue Cross Blue Shield from using an evidence of need determination and to require Blue Cross Blue Shield to agree to reimburse Appellant Blakewoods for covered health care benefits that it provides to Blue Cross Blue Shield subscribers. Blue Cross Blue Shield does not have the same evidence of need standard in its present Ambulatory Surgery Facilities Provider Class Plan and it does reimburse for such services. Is this issue moot?**
- V. The Appellants alleged in their Complaint that Blue Cross Blue Shield illegally included an evidence of need standard in its Ambulatory Surgery Facilities Provider Class Plan which violated MCL 550.1508(2). In an Order dated March 30, 2000, the Commissioner found that Blue Cross Blue Shield could have an evidence of need standard in such Plan. In an Order dated November 29, 2000, the Independent Hearing Officer affirmed the Commissioner's decision. The Appellants did not appeal that decision. Do the doctrines of res judicata and collateral estoppel bar the Appellants from raising this issue in this case?**
- VI. The Appellants state as their second Question Presented whether Blue Cross Blue Shield may refuse to reimburse a member or a subscriber for covered services lawfully rendered by a non-participating licensed provider. This question was not presented in the Appellants' Application for Leave to Appeal. MCR 7.302(F)(4) provides that, unless otherwise ordered by this Court, appeals are limited to the issues raised in the Application for Leave to Appeal. May the Appellants raise this question?**

VII. The Appellants state as their second Question Presented whether Blue Cross Blue Shield may refuse to reimburse a member or subscriber for covered services lawfully rendered by a non-participating licensed provider. The Appellants failed to plead they are members or subscribers of Blue Cross Blue Shield identified in the Complaint as having been denied reimbursement. Do the Appellants have standing to raise this issue?

INTRODUCTION

The circumstances involved in the case before this Court have changed significantly since the Appellants, Blakewoods Surgery Center, LLC, et al (hereafter Appellants) filed their complaint in this matter in 1998. At that time Blue Cross Blue Shield of Michigan (hereafter BCBSM) had an Ambulatory Surgery Facilities Provider Class Plan in effect which gave BCBSM the discretion to decide whether it would participate with such a facility. BCBSM called this standard "evidence of necessity or evidence of need" (hereafter EON). Subsequently, during a scheduled review of that plan, the Appellee, Commissioner of Insurance (hereafter Commissioner) found that BCBSM's EON was not reasonable and was not uniformly applied. As a result, the Commissioner required BCBSM to rewrite its plan, which BCBSM did.

The Commissioner approved the rewritten plan because it no longer gave BCBSM the discretion to decide with whom it would participate. Instead, the new plan is consistent with the mathematical standard used by the Department of Community Health to determine who qualifies for a Certificate of Need: 1,200 surgeries per operating room per year. In fact, Blakewoods Surgery Center, LLC (hereafter Blakewoods) has participated with and been reimbursed by BCBSM since October 2001. Moreover, the EON standard found in BCBSM's presently effective Ambulatory Surgery Facilities Provider Class Plan is a reasonable standard permitted by various sections of MCL 550.1101 *et seq*, the statute which regulates BCBSM. Therefore, this Court should affirm the Court of Appeals decision which affirmed the dismissal of the Appellants' complaint.

The Appellants' Complaint requested the trial court to issue a Declaratory Judgment that the Commissioner had the duty and authority to issue a cease and desist order to enjoin alleged *ultra vires* and illegal conduct by BCBSM. The Appellants contended that the Ambulatory Surgery Facilities Provider Class Plan filed by BCBSM was used by BCBSM to discriminate

against Blakewoods denying it the ability to enter into a participating agreement with BCBSM and thereby denying it payment for services it rendered to subscribers of BCBSM.

The trial court ruled that it had no jurisdiction to issue the requested declaratory judgment because the Commissioner had no legal duty to issue a cease and desist order since the only mandated responsibility of the Commissioner was to commence the review process set forth in MCL 550.1509. (App., pp. 22b-23b). In addition, the trial court found that the process set forth in this statute provided an adequate review to address the relief requested by the Appellants which should be followed before the Court should intervene.

The Court of Appeals affirmed, finding that no actual controversy existed because the available administrative process set forth in MCL 550.1509 preserved the Appellants' legal rights. (App., pp. 22b-23b). Furthermore, the Court found that resort to mandamus was inappropriate because the administrative process provided an adequate remedy for the Appellants. The Court of Appeals decision was correct and this Court should affirm that decision.

The Appellants have not complied with MCR 7.306(A) and MCR 7.212(C)(7) in presenting their arguments because they have failed to properly set forth a concise argument in support of each stated question. See *CRS, Inc. v Michigan National Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991). Moreover, the Appellants have failed to include a statement of the applicable standard of review and supporting authorities for each question presented. Furthermore, the Appellants have not supported their factual allegations by specific page references to the record.¹ See *Hearn v Schendel*, 355 Mich 648, 650-654; 95 NW2d 849 (1959). Finally, the Appellants' Appendix does not comply with MCR 7.307(A)(1)(2) because it does not have the relevant court docket entries and it is not arranged chronologically. Thus, the

¹ For example, see pages 9-10 and 29-34.

Commissioner has attempted to respond to each of Appellants' arguments by including specific page references to Appellants' brief following the order of questions as presented on pages vii-viii, *supra*.

COUNTER STATEMENT OF PROCEEDINGS AND FACTS

This Counter-statement of Proceedings and Facts is submitted because the Appellants' Statement of Facts does not comply with MCR 7.306(A) and MCR 7.212(C)(6) in that it is not a clear, concise and chronological narrative. In addition, all material facts are not stated without argument. Finally, the Appellants have not always cited to specific pages in the record. See *Hearn, supra*, pp 650-654.

Blakewoods is a professional corporation organized under the laws of the State of Michigan with its principal place of business in Jackson, Michigan. Blakewoods was formed for the purpose of operating an outpatient freestanding ambulatory surgical facility in which outpatient surgical procedures could be performed. It is licensed by the State of Michigan, Department of Community Health, as a freestanding surgical outpatient facility. (App., p. 584a). BCBSM is a non-profit health care corporation organized pursuant to 1980 PA 350, MCL 550.1101 *et seq.* Commissioner Cox is the former Commissioner of Insurance. (App., p. 559a, ¶¶ 1, 2, 4, 5, and p. 566a, ¶ 35).

Certificate of Need

In order to be licensed, Blakewoods was required to obtain a Certificate of Need (hereafter CON) issued by the Department of Community Health (App. 566a, ¶ 35). In order to receive a CON, Blakewoods had to ". . . demonstrate the need for a proposed project by credible documentation of compliance with the applicable certificate of need standards. . . ." MCL 333.22225.² Section 4 of the CON Standards for Surgical Services states, in pertinent part, that an applicant for a CON ". . . proposing to initiate a surgical service shall demonstrate that each proposed operating room shall perform an average of at least 1,200 surgical cases per year per operating room in the second 12 months of operation, and annually thereafter." (App., p.33b)

² The relevant portions of this statute are found in App., pp. 28b-29b.

Once licensed, Blakewoods could operate as a surgical facility and provide its services to anyone in the general public.

Evidence of Need

MCL 550.1506(1) requires BCBSM to file a provider class plan with the Commissioner for the appropriate provider class. (App., p. 21b). In December 1997, BCBSM filed the modification of its Ambulatory Surgery Facilities Provider Class Plan that is relevant to this matter. (App., p. 138a and pp. 38b-77b). The Commissioner accepted the Plan because it contained a reimbursement arrangement and objectives for each goal provided in MCL 550.1504. *In re Provider Class Plan*, 203 Mich App 707, 712-713; 514 NW2d 471 (1994), lv app den 448 Mich 869. Paragraph III C(1) of the Plan required outpatient surgery facilities, such as Blakewoods, to establish EON in order to enter into a participating agreement with BCBSM. This included a determination by BCBSM whether there was a need for it to participate with an additional ambulatory surgery facility in a given service area in order to provide service to BCBSM subscribers. (App., p. 45b). As stated by BCBSM:

. . . Evidence of Necessity (EON) is a BCBSM planning methodology that determines the amount of provider services needed in a specified geographical area. EON enables BCBSM to participate with the minimum number of providers required to adequately deliver services and ensures our group customers are not funding unnecessary capacity. The EON criterion is part of the ASF [ambulatory surgery facilities] Provider Class Plan filed with the Insurance Bureau and is applied to all prospective ASFs. If BCBSM determines that there are sufficient providers in a service area, BCBSM will not approve new facilities for participation until existing providers withdraw as a BCBSM provider, the number of services required in an area increase, or the addition does not change the area's overall service capacity. [App., p. 586a).

Blakewoods requested that BCBSM enter into a participation agreement with it so that Blakewoods could be a participating facility. (App., p. 585a). Pursuant to MCL 550.1401(7) and MCL 550.1502(1), such an agreement would have allowed Blakewoods to be paid directly

by BCBSM when the facility performed certificate covered services³ for BCBSM subscribers who had such coverage under their BCBSM policy. (App., pp. 15b and 18b-19b).

In a letter dated November 5, 1997, BCBSM suspended its review of the application of Blakewoods on the basis that Blakewoods had failed to meet the EON standard set forth in the Ambulatory Surgery Facilities Provider Class Plan filed by BCBSM with the Commissioner. (App., p. 586a).

Proceedings in the Circuit Court

Appellants alleged in their Complaint that BCBSM's refusal to enter into a participating agreement with Blakewoods violated various sections of 1980 PA 350. As a result, Appellants sought "declaratory and injunctive relief to force the Commissioner to issue a cease and desist order that enjoins BCBSM from using EON criteria" (App., p. 563a, ¶ 20). In addition, Appellants requested the trial court to "issue a declaratory judgment that as a matter of law, the Commissioner has the duty and authority to issue a cease and desist order to enjoin *ultra vires* and illegal BCBSM conduct" (App., pp. 578a-579a, ¶¶ B and C). Appellants relied upon MCR 2.605 and MCL 550.1619(3) for support of their position. (App., pp. 561a-562a, ¶¶ 12 and 18 and p 575a, ¶ 78).

The Commissioner filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(4), (7), (8), and/or (10) with Brief in Support on September 9, 1998. (Tr. Ct. Docket Entry 6, App., p. 2b). On December 1, 1998, the Commissioner filed a Supplemental Brief in Support of his Motion for Summary Disposition. Attached to that Brief, as Exhibit 1, was an affidavit that stated that the Commissioner would commence a review of the Ambulatory Surgery Facilities Provider Class Plan on July 1, 1999, pursuant to MCL 500.1509.

³ Certificate is defined in MCL 550.1104(3) as: ". . . a contract between a health care corporation and a subscriber or a group of subscribers under which health care benefits are provided to members." (App., p. 11b).

(App., p.22b-23b). This affidavit was not challenged by the Appellants. (Tr. Ct. Docket Entry 14, App., p. 2b).

On December 21, 1998, Appellants filed a cross Motion for Partial Summary Disposition with Brief in Support (App., p. 520a). On January 7, 1999 the Commissioner filed his Brief in Opposition to Appellants' Cross Motion (Tr. Ct. Docket Entry 23, App., p. 3b). On January 8, 1999, Appellants filed a Brief Supporting its Answer to the Commissioner's Motion for Summary Disposition. (App., p. 440a). On January 13, 1999, a hearing was held on the motions filed by the Commissioner and Appellants. (App., pp. 349a-388a). Post hearing briefs were filed by both parties. (Tr. Ct. Docket Entries 27, 29, 30 and 33, App. p. 3b).

On June 9, 1999, the Ingham County Circuit Court issued an Opinion and Order granting the Commissioner's Motion for Summary Disposition and dismissing the Appellants' Complaint in its entirety (App., p. 8a). On June 23, 1999, the Appellants filed a Motion and Brief for Reconsideration of the trial court's order (App. p. 406a). By Order dated July 20, 1999, the trial court denied the Motion for Reconsideration (App. p. 7a).

Proceedings in the Court of Appeals

On August 9, 1999, the Appellants filed their Claim of Appeal in the Court of Appeals. (Ct. of App. Docket Entry 1, App. 5b). The Appellants filed their Brief on Appeal on January 4, 2000 (App., p. 289a). The Commissioner filed his Brief on February 8, 2000, (Ct. of App. Docket Entry 22, App., p. 7b) and the Appellants filed their Reply Brief on February 29, 2000 (App., p. 275a). In an Order dated March 28, 2000, the Court of Appeals struck Exhibit 1 to the Appellants' Reply Brief. (Ct. of App. Docket Entry 32, App., p. 8b).

On January 19, 2001 the Court of Appeals issued an unpublished opinion which affirmed the Trial Court's decision. (App., p. 4a). The Court found that no actual controversy existed since a declaratory judgment was not necessary to guide the Appellants' future conduct in order

to preserve their legal rights since the review process set forth in MCL 550.1509 *et seq* preserved their legal rights. In addition, the Court denied mandamus because the administrative review process then under way presented an alternative adequate remedy. (App., pp. 5a-6a).

The Appellants filed a Motion for Rehearing on February 9, 2001 (App., pp. 264a-274a)⁴ and the Commissioner responded on February 23, 2001 (App., p. 257a). The Court of Appeals denied this motion in an Order dated March 8, 2001. (App., p. 3a).

Proceedings in this Court

The Appellants filed an Application for Leave to Appeal to this Court on March 30, 2001. (Ct. of App. Docket Entry 48, App. p. 9b). The Commissioner filed his Response on April 20, 2001 (Ct. of App. Docket Entry 52, App., p. 10b). In an Order dated October 23, 2001, this Court asked the Commissioner to answer the question of whether BCBSM's EON determination was a reasonable standard permitted by MCL 550.1502(8). (App., p. 2a). The Commissioner responded to this question on November 19, 2001. (App., p. 114a). The Appellants filed their Brief in Response on December 3, 2001. (App., p. 10a). However, they did not advise this Court that Blakewoods was participating with BCBSM as of October 2001. The Commissioner filed his Reply Brief on December 13, 2001. (Ct. of App. Docket Entry 56, App., p. 10b) This Court granted Appellants' Application for Leave to Appeal in an Order dated April 30, 2002. (App., p. 1a). The Appellants filed their Brief on Appeal on June 25, 2002.

Proceedings before the Commissioner

Prior to the time of the filing of the Appellants' complaint, the Commissioner had not reviewed the Ambulatory Surgery facilities Provider Class Plan because no one had requested the Commissioner to do so and he was not required to do so. However, in accord with the Affidavit filed by the Commissioner in the Trial Court, the Commissioner initiated a review of

⁴ The Appendix does not include the four exhibits that were filed with the motion.

the Ambulatory Surgery Facilities Provider Class Plan on July 6, 1999. (Tr. Ct. Docket Entry 14, App., p. 2b). Notification was sent to interested persons, including counsel for Appellants and a public hearing was held on August 23, 1999. (App., pp. 139a-140a). At least 35 people representing varied interests attended, 11 of whom testified. (App., pp. 172a-177a). Appellants' counsel was among those who testified, expressing the Appellants' concerns about the Plan and its EON standard at the public hearing. (App., pp. 174a-175a). In addition, written testimony was submitted by over 70 individuals or organizations. (App., pp. 176a, 177a).

Pursuant to MCL 550.1510(1)(c), the Commissioner issued his Determination Report on March 30, 2000, finding that BCBSM could lawfully establish EON standards so long as they were reasonable and uniformly applied which providers had to meet if they wished to participate with BCBSM. (App., pp. 127a-128a and 153a). However, the Commissioner found that BCBSM's standards were not reasonable and were arbitrarily applied. As a result the Commissioner required BCBSM to re-write its Ambulatory Surgical Facilities Provider Class Plan. (App., p. 169a, and *Genesis Center v Commissioner of Insurance*, 246 Mich App 531, 533-539; 633 NW2d 834 (2001)) Dissatisfied with the Commissioner's ruling allowing EON standards of any kind, the Appellants appealed the Commissioner's decision pursuant to MCL 550.1515 and the Independent Hearing Officer dismissed the appeal on November 29, 2000. (App., p. 78b-82b). The Appellants did not appeal that decision.

On December 29, 2000, BCBSM submitted its revised plan and on March 29, 2001 the Commissioner retained BCBSM's re-written Ambulatory Surgery Facilities Provider Class Plan pursuant to MCL 550.1506 and MCL 1513(1). (App., pp.185a-193a). This Plan completely revised BCBSM's EON standard so that it was the same as the 1,200 surgeries per operating

room per year required to obtain a CON.⁵ (App., pp. 188a-191a and 200a-202a). The Appellants did not appeal that decision even though they could have done so pursuant to MCL 550.1515.

On October 9, 2001 Blakewoods met the qualification standards in the Ambulatory Surgery Facilities Provider Class Plan approved by the Commissioner's Order of March 29, 2001 and entered into a participation agreement with BCBSM. (App. 185a, and Appellants' Brief, pp. 11-12).

In an Order dated January 31, 2002, the Commissioner entered an order approving, pursuant to MCL 550.1508(1)(b), BCBSM's modifications to the Ambulatory Surgery Facilities Provider Class Plan. (App., pp. 84b-92b) Even as modified, this Plan continued to contain a requirement that an ambulatory surgery facility meet an EON qualification standard in order to participate. (App., p. 104b). The Appellants did not appeal that decision even though the order expressly advised of that opportunity pursuant to MCL 600.631. (App., p. 91b).

⁵ The revised Ambulatory Surgery Facilities Provider Class allows an applicant who wants to participate to qualify with a reduced number of surgeries, at least 900, due to the anticipated increase in surgeries likely to result from gaining participation status. (App., p. 203a-204a).

ARGUMENT

I. BCBSM May Have an "Evidence of Need" or "Evidence of Necessity" Standard in its Ambulatory Surgery Facilities Provider Class Plan as Long as Such Standard is Reasonable and Uniformly Applied.

A. Standard of Review

Questions of statutory interpretation are questions of law, which are reviewed de novo.

In re MCI, 460 Mich 396, 413; 596 NW2d 164 (1994).

B. BCBSM may set reasonable standards to determine with whom it will participate.

MCL 550.1502(1) provides that BCBSM may enter into a participating agreement with an entity such as Blakewoods. MCL 550.1105(4), MCL 550.1107(1), and MCL 550.1502(3) and MCL 550.1502(8) provide that BCBSM may establish standards which are applicable to those entities, such as Blakewoods, who wish to participate. Thus, BCBSM may have an EON standard as long as such standard is reasonable and uniformly applied to all applicants in a particular provider class plan who wish to participate.

MCL 550.1502(1) states, in pertinent part, as follows:

A health care corporation may enter into participating contracts for reimbursement with professional health care providers practicing legally in this state for health care services that the professional health care providers may legally perform. . . . [App., p. 18b-19b].

A participating contract is:

[A]n agreement, contract or other arrangement under which a provider agrees to accept the payment of the health care corporation as payment in full for health care services or parts of health care services covered under a certificate, as provided for in section 502(1).[MCL 550.1107(2), App., p. 13b]

Without such a participating contract, BCBSM cannot reimburse Blakewoods when it provides services to BCBSM subscribers. MCL 550.1401(7). (App., p. 15b).

MCL 550.1502(8) provides, in pertinent part, as follows:

A health care corporation shall not deny participation to a freestanding surgical outpatient facility on the basis of ownership if the facility meets the reasonable standards set by the health care corporation for similar facilities. . . . [App., p. 19b]

See also MCL 550.1105(4), 550.1502(3), and 550.1107(1) which contain similar language.

According to this Court:

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first step in that determination is to review the language of the statute itself. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). Should a statute be ambiguous on its face, however, so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning. *Sam v Balardo*, 411 Mich 405, 418; 308 NW2d 142 (1981); *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

* * *

It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Likewise, a court should refrain from speculating about the Legislature's intent beyond the words employed in the statute. *City of Lansing v Lansing Twp*, 356 Mich 641, 648-649; 97 NW2d 804 (1959).

* * *

In general, we recognize the rule that statutes relating to the same subject matter should be read and construed together to determine the Legislature's intent. [*In re MCI*, *supra*, pp. 411-416].

It is also clear that the use of "may" in MCL 550.1502(1) denotes a discretionary decision while "shall" in MCL 550.1502(8) is mandatory. *Browder v Int'l Fidelity Ins Co* 413 Mich 603, 612; 321 NW2d 668 (1982); *Law Department Employees Union v City of Flint*, 64 Mich App 359, 368; 235 NW2d 783 (1975).

Applying these cases to MCL 550.1502(1) and 550.1502(8), it must be concluded that BCBSM is allowed to enter into participating contracts but is not required to do so. However, BCBSM cannot refuse to participate with an ambulatory surgery facility, such as Blakewoods, on the basis of ownership (i.e., doctor-owned) as long as Blakewoods meets the "reasonable" standards established by BCBSM for all ambulatory surgery facilities.

The term "reasonable" has been defined as meaning "... fit and appropriate to the end in view. . . ." and not "... arbitrary and capricious. . . ." *Parker v Judge of Recorder's Court*, 236 Mich 460, 466; 210 NW 492 (1926) quoting with approval from 7 Words and Phrases, p. 5953. The primary objective of MCL 550.1101 *et seq* is to "... check rising health care costs" and it is "... aimed at curbing the rise in health care costs by a unique statutory scheme which combines both free market and government regulatory methods of control." *Blue Cross Blue Shield of Michigan v Governor*, 422 Mich 1, 18; 367 NW2d 1 (1985). This language, coupled with the language in MCL 550.1502(1), clearly establishes that the legislature intended to permit BCBSM to enter into participating agreements to further its obligation to curb the rise in health care costs. Thus, reasonable actions which BCBSM takes to curb health care costs are permissible.

It is an obvious fact that it costs hundreds of thousands of dollars or more to construct an ambulatory surgery facility. If BCBSM is prohibited from establishing a reasonable need standard to determine with whom it would participate, then it would effectively be forced to participate with every licensed provider. This would include those facilities that have very few patients. In such a situation, the construction costs per patient would be very high with the result that such facilities would demand more in reimbursement from BCBSM than a facility with many more patients where the capital costs could be spread out over more patients. This increase in reimbursement would increase BCBSM's payout and increase health care costs, contrary to the intent set forth in MCL 550.1102 and contrary to the cost goal requirement of

MCL 550.1504(1)(c). (App., p. 11b and 20b and *BCBSM v Governor, supra*, p. 18). Thus, it is reasonable for BCBSM to have in its present Ambulatory Surgery Facilities Provider Class Plan a requirement that facilities who wish to participate perform a minimum of 1,200 surgeries per operating room per year, the same as the facility demonstrated to the Department of Community Health that it would have when it received its CON. (App., pp. 201a-206a and p. 33b).

In other words, the "end in view" under the terms of MCL 550.1101 *et seq* is to keep health care costs from rising. *BCBSM v Governor, supra*, p. 18. Having an Ambulatory Surgery Facilities Provider Class Plan that helps keep health care costs from rising is appropriate to reach that end. The minimum reasonable requirement of having 1,200 surgeries per operating room per year is not arbitrary or capricious because it is the same standard which Blakewoods had to meet in order to receive its CON.⁶ (App., p. 33b). Moreover, the 1,200 surgery requirement is uniformly applied to all ambulatory surgery facilities whether doctor-owned or not. (App. 188a-190a).

Appellants argue that BCBSM uses its EON standard to "restrict or vitiate Blakewood's license." (Appellants Brief, p. 19, 29, and 35). However, BCBSM's presently effective Ambulatory Surgery Facilities EON standard (App., pp. 202a-206a) is the same as the standard established by the Department of Community health, 1,200 surgeries per operating room per year. (App., p. 33b). Moreover, any action by BCBSM to deny participation to an ambulatory surgery facility does not prohibit that facility from operating under its license. It can still provide an operating room for all of the surgeries permitted by its license. The only ramification of such a refusal is that BCBSM will not reimburse the facility if the patient is a BCBSM subscriber.

⁶ See *Bundo v Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976) where this Court defined arbitrary and capricious.

BCBSM's refusal to participate does not affect reimbursement by any other insurer or health maintenance organization.

The Appellants argue that BCBSM refuses to recognize Blakewoods' license because it allegedly failed to reimburse Blakewoods for services rendered to Viola McLennan. (Appellants' Brief, p. 16). However, Blakewoods obviously operated under its license if, in fact, it performed the service for Ms. McLennan. Blakewoods presumably simply received its payment from Ms. McLennan rather than from BCBSM.

In *Psychological Services v Blue Cross Blue Shield*, 144 Mich App 182; 375 NW2d 382 (1985), the plaintiffs obtained a CON from the Department of Public Health,⁷ but, BCBSM chose not to participate with them. On appeal challenging that denial the Court upheld BCBSM's decision, distinguishing between the public need for a clinic determined by the CON process and BCBSM's subscribers' need determined by its EON standard:

[P]laintiff reasons that the public is therefore deprived of needed care if plaintiff is not given a provider number. Plaintiff also contends that the lack of a provider number prevents its staff from continuing to care for patients who depended on defendant for medical insurance coverage. However, plaintiff is free to operate its clinic and the members of its staff are free to practice their professions without provider numbers; whether plaintiff has a provider number merely determines the financial source to which plaintiff must look for compensation. *Michigan Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan*, 101 Mich App 559, 571-573; 301 NW2d 33 (1980), *modified in part on other grounds* 411 Mich 869; 306 NW2d 101 (1981); *Desgranges Psychiatric Center, PA v Blue Cross & Blue Shield of Michigan*, 124 Mich App 237, 245; 333 NW2d 562 (1983). There has been no evidence produced here to show that operation of an outpatient psychiatric clinic like that of plaintiff is economically unfeasible without a provider number. Even if the issuance of a certificate of need demonstrates a public need for plaintiff's clinic, it does not demonstrate that defendant's subscribers need such a clinic. [*Id.*, p. 186] (emphasis added)

Likewise, in the instant matter, there is no evidence in this case that Blakewoods is economically unfeasible without a participating agreement. In fact, the evidence is the opposite. Blakewoods

⁷ Now the Department of Community Health.

operated from the time that it received its license in August 1997 (App., p. 584a) until October, 2001 without reimbursement by BCBSM. (Appellants' Brief, pp. 11-12). Thus, BCBSM's EON standard did not restrict or vitiate Blakewoods' license.

Moreover, if the law is read to force BCBSM to participate with all providers, and it cannot adopt reasonable EON standards, then no effect will be given to the text of MCL 550.1501(1) which says that BCBSM "may" enter into such agreements. This would be contrary to the rules of statutory construction set forth by this Court in *In re MCI*, *supra*, p. 414.

The Appellants also argue that they ". . . entered into a provider participation agreement agreeing to restrict the facility's surgical services only to eye care in order to secure some form of BCBSM participation." (Appellants' Brief, pp. 12 and 35). First of all there is no evidence in this record to support the Appellants' allegations that it agreed to limit its services to only eye care. Second, there does not appear to be any provision in the Ambulatory Surgery Facilities Provider Class Plan approved by the Commissioner's Order of March 29, 2001 which would require such a restriction. (App., pp. 194a-236a) Third, there is no evidence which establishes that if this restriction exists, it has anything to do with the EON that exists in the Ambulatory Surgery Facilities Provider Class Plan approved by the Commissioner on March 29, 2001 (App., p. 202a-206a) and under which Blakewoods was able to participate. In fact, as part of BCBSM's submission to obtain approval of such Plan, it showed that Blakewoods performed 1,336 surgeries in each of its operating rooms, thus more than meeting the 1,200 surgeries per operating room required by the EON in the presently effective Ambulatory Surgery Facilities Provider Class Plan. (App., p. 256a). Moreover, this issue was not included in the Complaint and not raised in Appellants' Application for Leave to Appeal. MCR 7.302(F)(4). As a result, this Court should not address this issue now.

The Appellants also argue that:

The provider class plan's function is to implement a reimbursement agreement or arrangement between BCBSM and health care providers. [Appellants' Brief, p. 43]

Thus, they argue, BCBSM is not permitted to have an EON standard. However, MCL 550.1107(7) defines "Provider Class Plan" as:

[A] document containing a reimbursement arrangement and objectives for a provider class, and, in the case of those providers with which a health care corporation contracts, provisions that are included in that contract. [App., p. 13b, (emphasis added)].

Moreover, MCL 550.1504(1) provides in part that BCBSM shall enter into a reimbursement arrangement

[T]o assure subscribers reasonable access to, and reasonable cost and quality of, health care services, in accordance with the following goals:

(a) There will be an appropriate number of providers throughout this state to assure the availability of certificate-covered health care services to each subscriber. [App., p. 20b]

Thus, a provider class plan must contain much more than just a reimbursement arrangement.

Furthermore, MCL 550.1509(1) allows the Commissioner to review a provider class plan to determine if BCBSM ". . . has substantially achieved the goals . . . as provided in section 504 [MCL 550.1504] and achieved the objectives contained in the provider class plan." *In re Provider Class Plan, supra*, p. 713. In addition, MCL 550.1510(1) provides that the Commissioner must determine if BCBSM has met the goals set forth in MCL 550.1504(1). (App. p. 23b). If BCBSM was required to participate with all providers and if BCBSM could not apply reasonable EON standards to determine with whom it would participate, then there would not be any need for the Legislature to have allowed the Commissioner to review a plan to determine if BCBSM met the goal of "availability of certificate covered health care services to each subscriber." (MCL 550.1504(1)(a), App., p. 20b). Availability of services "to subscribes"

squarely addresses the issue of access for that select group of individuals as distinguished, necessarily from the public at large. In other words, if BCBSM was denied the ability to utilize EON standards to limit with whom it would participate, it would be required to participate with everyone and the availability of services would not be an issue for the Commissioner to review. *Id.*, 731. Thus, the Legislature clearly intended to allow BCBSM to include reasonable EON in its provider class plans.

The Appellants also argue that MCL 550.1502(8) establishes the only need, i.e., a license, that a provider must satisfy in order to participate with BCBSM and that somehow an EON standard displaces the CON standard. (Appellants' Brief, p. 49). However, the plain language of MCL 550.1502(8) read in conjunction with two other sections of the act simply does not support this argument. It provides that BCBSM shall not deny participation on the basis of ownership if: 1) a facility meets BCBSM's reasonable standards, 2) is licensed, and 3) complies with MCL 333.22201 to 333.22260. (App., p. 19b). If the legislature intended that licensure alone was the criterion for participation, it would never have included the provision that allows BCBSM to have "reasonable standards" and it would not have allowed BCBSM the discretion to enter into reimbursement arrangements under MCL 550.1502(1). Moreover, while in order to be licensed as an ambulatory surgery facility the entity must obtain a CON to meet a public need, that CON does not establish whether BCBSM needs the provider in order to meet the access (availability) goal for subscribers set out in MCL 550.1504(1)(a). Instead, the CON is simply a determination that the provider is needed to serve all of Michigan's residents regardless of any insurance coverage they may or may not have. Without this ability BCBSM cannot adequately comply with the act's goals of maximizing access to service and containing costs. As an example, if BCBSM is required to participate with everyone, then the capital cost per surgery will be higher for those facilities with fewer than 1,200 surgeries per operating room and these

facilities will demand more reimbursement from BCBSM. Thus, MCL 550.1502(8) cannot be read consistent with the Legislature's intent expressed in MCL 550.1504(1)(a) to eliminate BCBSM's ability to have a reasonable EON standard.

The Commissioner determined that BCBSM was authorized to set reasonable EON standards when he reviewed the Ambulatory Surgery Facilities Provider Class Plan in effect in 1997-98. (App. 152a-153a) The Appellants appealed that decision pursuant to MCL 550.1515(1). (App, p. 80b). The Independent Hearing Officer affirmed (App., p. 82b) but the Appellants did not appeal. If the Appellants did not agree with the Independent Hearing Officer's conclusion or with the Commissioner's approval of BCBSM's remedial Ambulatory Surgery Facilities Provider Class Plan on March 29, 2001, they should have appealed. Since they failed to do so then, they should not now be permitted to request this Court to determine whether BCBSM may have an EON standard when that standard has now changed significantly from what it was at the time of Appellants' Complaint. This result is even more compelled now that Blakewoods participates with BCBSM under the terms of BCBSM's revised Ambulatory Surgery facilities Provider Class Plan approved by the Commissioner. (App. 185a-257a).

In conclusion, BCBSM's EON standards in its Ambulatory Surgery Facilities Provider Class Plan are reasonable within the plain meaning of MCL 550.1502(8) as read together with MCL 550.1502(1) and 550.1504(1)(a). BCBSM's presently effective EON standard (that requires a facility to perform 1,200 surgeries per operating room per year to participate with BCBSM) is reasonable because it is the same standard that Blakewoods had to meet in order to receive its CON and its license to operate. Thus, if this Court reaches the EON issue that Appellants failed to properly preserve, it should rule that a health care corporation such as BCBSM may adopt EON standards in a provider class plan so long as they are reasonable and uniformly applied.

II. An Actual Controversy Does Not Exist Because A Declaratory Judgment Is Not Necessary to Guide the Appellants' Future Conduct in Order to Preserve Their Legal Rights.

A. Standard of Review

This Court reviews de novo a Trial Court's decision on whether to grant summary disposition. *Smith v Globe Life Ins. Co.*, 460 Mich 446, 454; 597 NW2d 28 (1999). In *Herald Company v Ann Arbor Public Schools*, 224 Mich App 266, 271; 568 NW2d 411 (1997), the Court of Appeals held that an appellate court reviews ". . . de novo the Trial Court's rulings regarding questions of law and declaratory judgment actions." Finally, the applicability of whether the primary jurisdiction doctrine applies is a question of law subject to de novo review. *Spect Imaging v Allstate Insurance*, 246 Mich App 568, 580; 633 NW2d 461 (2001).

B. The Court of Appeals correctly found that an actual controversy did not exist.

The Appellants sought a declaratory judgment that BCBSM had violated 1980 PA 350 and that the Commissioner failed to enforce 1980 PA 350 against BCBSM. (App., pp. 578a-579a) In particular, the Appellants alleged that BCBSM used an EON standard in its Ambulatory Surgery Facilities Provider Class Plan as a basis to refuse to enter into a participation agreement with Blakewoods Surgery Center. (App., pp. 570a, ¶¶ 52-54). In order to grant declaratory relief, an actual controversy must exist. Here, no actual controversy existed so the Trial Court was correct in concluding that it did not have jurisdiction to proceed and the Court of Appeals properly affirmed.

MCR 2.605(A)(1) states:

In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

In *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978) cert den 442 US 934; 61 L Ed 2d 303; 99 SCt 2869 (1979) this Court held that:

The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief. In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's conduct in order to preserve his legal rights.

In *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117, 121; 380 NW2d 117 (1985), *lv App den* 424 Mich 875, the Court of Appeals held:

Where no case of actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment.

As previously noted, BCBSM filed its Ambulatory Surgery Facilities Provider Class Plan pursuant to MCL 550.1506. (App., p. 21b). Initially the Commissioner may only examine such Provider Class Plan to determine if it contained a reimbursement arrangement and objectives for each goal provided in MCL 550.1504. After the Plan has been in effect for two years, the Commissioner may more thoroughly review the plan pursuant to MCL 550.1509(1)(b). (App., pp. 22b-23b). If the Commissioner makes such review, he must determine whether BCBSM has substantially achieved the goals of the corporation set forth in MCL 550.1504 (App. p. 20b) and achieved the objectives contained in the Provider Class Plan. (See MCL 550.1509(1)). (App., p. 22b). One of the goals is whether the Plan gives BCBSM's subscribers sufficient access to providers such as Blakewoods. During this review process, the Commissioner must consider comments from interested persons pursuant to MCL 550.1509(4)(e). (App., p. 23b). See *In re Provider Class Plan*, *supra*, 711-714.

The Commissioner initiated a review and determination of BCBSM's Ambulatory Surgery Facilities Provider Class Plan on July 6, 1999. (App., pp 139a-140a). During that review, the Appellants had the opportunity to raise any concerns which they had about such Plan as permitted in MCL 550.1509(4)(e). This included their objections to BCBSM's use of an EON

standard. (App., pp. 174a-175a). The Commissioner found that BCBSM could lawfully include EON standards in its plan. (App., pp. 145a-153a). The Commissioner also concluded, however, that BCBSM applied its EON standard in a way that discriminated against doctor-owned facilities in violation of MCL 550.1502(8). (App., pp. 152a-153a).

The Appellants sought an appeal before an Independent Hearing Officer as permitted by MCL 550.1515. (App., p. 25b-26b). The Independent Hearing Officer found that the Commissioner had correctly concluded that BCBSM could include reasonable evidence of need standards in its Plan. (App., p. 81b).⁸ Thus, the Appellants' legal rights were preserved by this review process and so a declaratory judgment was not needed to guide their future conduct in order to preserve their rights. In other words, there was no need for the Circuit Court to grant declaratory relief on the issue of whether BCBSM could include an EON standard in their Ambulatory Surgery Facilities Plan or whether BCBSM used the Plan to discriminate in violation of MCL 550.1502(8) because MCL 550.1509 *et seq* provided a method for the Appellants to contest these issues and thereby preserve their legal rights. Moreover, the Commissioner addressed the Appellants' concerns in his review and ordered BCBSM to re-write its Plan. (App., p. 169a). As a result, no actual controversy existed. Therefore, the Court of Appeals was correct in affirming the trial court's dismissal of Appellants' Complaint.

In an almost identical situation, the healthcare providers in *Genesis, supra*, 535 alleged that BCBSM's EON standard in its Ambulatory Surgery Facilities Provider Class Plan was used to discriminate against non-hospital owned facilities. The Court of Appeals held that no actual controversy existed:

Plaintiffs claimed that BCBSM was discriminating against non-hospital owned ambulatory facilities and that defendant's provider plan review would not address

⁸ However, the Appellants did not file an Application for Leave to Appeal the Independent Hearing Officer's decision, as permitted by MCL 550.1518. (App., p. 26b).

this discrimination. However, as stated previously, defendant specifically considered plaintiffs' comments regarding BCBSM's discrimination and found that BCBSM, indeed, was manipulating its EON criteria to discriminate against ambulatory surgery facilities, such as Genesis, that were not owned by hospitals. Plaintiffs failed to prove an actual controversy because the provider plan review process set out in MCL 550.1509 through 1518; MSA 24.660(509) through (518) provides plaintiffs with the ability to preserve their legal rights. A further declaration by the circuit court was unnecessary to protect plaintiffs' rights. Thus, the circuit court properly dismissed plaintiffs' claim for declaratory relief. [*Id.*, pp. 545-546 (Footnote Deleted)]

This Court should reach a similar result and affirm the Court of Appeals which affirmed the dismissal of Appellants' complaint.

Appellants argue that an actual controversy existed because the Commissioner continues to allow BCBSM to use the EON standard to restrict the ability of Blakewoods to participate. (Appellants' Brief, p. 19)⁹ However, this is not the criterion for determining whether an actual controversy exists. The review process carried out by the Commissioner as provided in MCL 550.1509 *et seq.* (App., pp. 22b-26b) allowed the Appellants to challenge what BCBSM did and in that way preserve their legal rights. In other words, since the Appellants did not agree with the Commissioner's review of the Ambulatory Surgery Facilities Provider Class Plan, they appealed it pursuant to MCL 550.1515 and thereby preserved the legal rights. As a result, there was no need for the Court to grant a declaratory judgment. Thus, no actual controversy existed so as to give the trial court jurisdiction. *Recall Blanchard Committee, supra*, p. 121.

While Blakewoods was granted a CON when it was licensed by the state as an ambulatory surgery center, that fact does not require that BCBSM participate with Blakewoods. If that were the case, then many provisions of 1980 PA 350 would be meaningless. These include MCL 550.1502(1) which states that BCBSM "may" enter into participation agreements

⁹ As will be discussed in Issue IV, pp. 31-34, BCBSM now uses a totally different EON that is consistent with the standards for obtaining a CON and Blakewoods participates with BCBSM under that EON standard.

with facilities. (App., pp. 18b) Other examples include MCL 550.1105(4), MCL 550.1107(1), MCL 550.1502(3) and MCL 550.1502(8), all of which provide that BCBSM can establish standards that providers must meet if they want to participate with BCBSM. (App., pp. 12b-13b and 19b). Such provisions cannot be ignored but must be given meaning. *State Bar of Michigan v Galloway*, 422 Mich 188, 196; 369 NW2d 839 (1985). Furthermore, the Court of Appeals has held that BCBSM may have reasonable standards. (See *Blakewoods Surgery Center, et al v BCBSM*, Docket No. 213666, unpublished opinion dated July 14, 2000, p. 4, and *Greater Lansing Ambulatory Center, et al v BCBSM*, Docket No. 206415, unpublished opinion dated April 13, (1999), App., p. 120b-126b)). While these opinions are not binding precedent, their conclusions are supported by sound reasoning and should be followed by this Court. *Genesis Center v BCBSM*, 243 Mich App 692, 696; 625 NW2d 37 (2000).

The Appellants cite *BCS Life Insurance Co v Insurance Commissioner*, 152 Mich App 360, 368; 393 NW2d 636 (1986), for the proposition that existence of another adequate remedy does not preclude an action for declaratory judgment. While that statement is correct, in the instant matter, the trial court must still have jurisdiction in order to grant a declaratory judgment. *Genesis v Commissioner, supra*, p 544, fn 9. The only way that the trial court could have had jurisdiction is if an actual controversy existed. Here no actual controversy existed because the declaratory judgment was not needed in order to guide the Appellants' future conduct in order to preserve their legal rights since the Commissioner's review of the Plan gave Appellants that guidance.

The Appellants also argue that the Commissioner allows BCBSM to assume the power of licensure through EON determinations. (See Appellants' Brief, pp. 21 and 23-24). This is inaccurate. Every licensed ambulatory surgery facility can operate. The issue here is whether BCBSM must enter into a participation agreement with every facility and reimburse the facility

so as to provide enough facilities to meet the needs of its subscribers as required by MCL 550.1504(1)(a). (App., p. 20b). MCL 550.1502(1) gives BCBSM the discretion to participate but does not mandate it. (App., p. 18b). As previously discussed, BCBSM does have the right to establish standards that must be met by those who wish to participate. If a facility does not meet those standards, BCBSM does not have to enter into a participation agreement with that facility. This does not affect the facility's ability to operate under its license but only whether it will be paid by BCBSM for services or by the patient. (See *Psychological Services, supra*, p. 185). Thus, this argument of the Appellants does not establish a basis for reversing the Court of Appeals decision.

Appellants argue that MCL 550.1619(3) (App. p. 27b) gives the Court jurisdiction, regardless of the requirements set forth in MCR 2.605 or the availability of an administrative remedy. (Appellants' Brief, pp. 51-52). However, Appellants fail to cite any authority for this position. As a result, the Court should consider the Appellants' position abandoned. See *Micham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Holtzlander v Brownell*, 182 Mich App 716, 725; 453 NW2d 295 (1990) and *Isagholian v Transamerica Insurance*, 208 Mich App 9, 14; 527 NW2d 13 (1994).

MCL 550.1619(3) states as follows:

A political subdivision of this state, an agency of this state, or any person may bring an action in the circuit court for Ingham court for declaratory and equitable relief against the commissioner or to compel the commissioner to enforce this act or rules promulgated under this act. [App., p. 27b]

An accurate reading of MCL 550.1619(3) simply means that the legislature created a cause of action where one did not exist at common law. Appellants are permitted to bring the action under this statute against the Commissioner to force him to enforce the law where no such right previously existed. This language does not mean that the Appellants are automatically

entitled to declaratory relief without meeting the criteria for receiving declaratory relief. *Genesis v Commissioner*, supra, p. 544, fn. 9. As previously noted, the instant matter is almost identical to the facts in *Genesis v Commissioner*, supra, pp. 533-539. In that case the Court of Appeals held that:

Although plaintiffs are correct in stating that subsection 619(3) allows them to bring an action in the Ingham Circuit Court, we do not believe that subsection 619(3) allows the circuit court to conduct the same type of review that the commissioner has authority to conduct under the NHCCRA. [Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq*] The circuit court would be exceeding its authority if it were to conduct a comprehensive review of the provider class plan as plaintiffs requested in this case. See, e.g., *In re Provider Class Plan*, supra, at 730. Instead, we read subsection 619(3) as presenting an appropriate avenue by which the circuit court can compel the commissioner to enforce the NHCCRA, e.g. to conduct a provider class plan review to determine if BCBSM is discriminating against surgical facilities not owned by hospitals. [*Id.*, pp 542-543]

Likewise in the instant matter, simply because Appellants filed their Complaint pursuant to MCL 550.1619(3) does not mean they automatically are within the Court's jurisdiction; rather, the Appellants still had to establish that an actual controversy existed in order for the trial court to grant declaratory relief. See also *Allan v M & S Mortgage Co.*, 138 Mich App 28; 359 NW2d 238 (1984), lv to app den 422 Mich 961 (1985). Thus, the Appellants have failed to establish that an actual controversy existed so as to give the trial court jurisdiction. As a result, this Court should affirm the Court of Appeals decision.

C. The trial court did not have jurisdiction under the Doctrine of Primary Jurisdiction.

The Legislature set forth its intent in MCL 550.1102(1)(2) that the Commissioner is to regulate and supervise BCBSM so as to secure for its subscribers the opportunity for access to health care services. (App., p. 11b). This legislative determination clearly establishes that the legislature intended the Commissioner to have primary jurisdiction over BCBSM to the

exclusion of the circuit court. Thus, the trial court was correct in dismissing the Appellants' Complaint.

MCL 550.1102 states, in relevant part, as follows:

(1) It is the purpose of and intent of this act, and the policy of the legislature, to promote an appropriate distribution of health care services for all residents of this state, to promote the progress of the science and art of health care in this state, and to assure for nongroup and group subscribers, reasonable access to, and reasonable cost and quality of, health care services, in recognition that the health care financing system is an essential part of the general health, safety, and welfare of the people of this state. . . .

(2) It is the intention of the legislature that this act shall be construed to provide for the regulation and supervision of nonprofit health care corporations by the commissioner of insurance so as to secure for all of the people of this state who apply for a certificate, the opportunity for access to health care services at a fair and reasonable price.

(3) It is the public policy of this state that, in the interest of facilitating access to health care services at a fair and reasonable price, an alternate, expeditious, and effective procedure for the resolution of issues and the maintenance of administrative appeals relative to provider class plans be established and utilized, and to that end, the provisions of this act regarding administrative review of those provider class plans shall be construed so as to minimize uncertainty and delays. [App., p. 11b, emphasis added)].

As this language makes clear, the Legislature intended MCL 550.1101 *et seq* to be construed to provide "reasonable access to . . . health care services" and that the Commissioner was to have the authority to regulate BCBSM to accomplish that goal. Moreover, the Legislature intended to facilitate access by creating a process to review provider class plans in an effective, alternative procedure so as to ". . . minimize uncertainty and delays." As concluded by the Court of Appeals:

The Legislature vested the IC [Commissioner] with the primary authority to regulate BCBSM and to see that the act's requirements were satisfied [*In re Provider Class Plan, supra*, p. 711 (Emphasis Added)].

The concept of an agency having primary jurisdiction over a particular subject matter has been recognized by this Court in *Rinaldo's v Michigan Bell*, 454 Mich 65, 70; 559 NW2d 647

(1997). In that case the Court described the doctrine of primary jurisdiction as follows:

Primary jurisdiction "is a concept of judicial deference and discretion." LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262, 282; 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that "[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action." *Id.* at 271. Thus, LeDuc notes, "[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start." *Id.* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction "whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency." *Id.* at § 10:43, p 70.

In *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 613; 327 NW2d 805 (1982), we applied the United States Supreme Court's definition of the doctrine from *United States v Western P R Co*, 352 US 59; 77 S Ct 161; 1 L Ed 2d 126 (1956):

" ' Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." [*Id.*, pp. 70-71].

In *Rinaldo's*, this Court held that customer claims that fell within the tariffs and regulations promulgated by the Michigan Public Service Commission must be brought before the Commissioner. *Id.*, pp. 73-74. Here, as noted above, the Legislature specifically gave the Commissioner jurisdiction over BCBSM to insure that its subscribers had access to providers. (MCL 550.1102) (App., p. 11b)

This Court went on to set forth the criteria for determining whether the doctrine of primary jurisdiction applies:

First, a court should consider "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. . . ." Second, it

should consider "the need for uniform resolution of the issue. . . ." Third, it should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." Davis & Pierce, 2 Administrative Law (3d ed), § 14.1, p 272. Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body. [*Id.*, pp. 71-72].

In the instant matter, the Commissioner has the specialized expertise to review provider class plans since he reviews some plans every year as required by MCL 550.1509(7). (App., p. 23b) Second, there is a need for uniform resolution of what can and cannot be included in a provider class plan. It would be chaotic if providers could go to the various circuit courts of the state for interpretations of whether standards such as BCBSM's EON were properly included in a provider plan. Third, if the Circuit Courts of the state could each make such determinations, then the Commissioner's regulation of BCBSM regarding what should be in a provider class plan would be adversely impacted. Resort to the circuit courts would also frustrate the Legislature's intention for an administrative review of such plans. (MCL 550.1102(3), App., p. 11b). Finally, the Commissioner's decision on any plan is subject to judicial review directly to the Court of Appeals so that consistent interpretations can be reached. (MCL 550.1518, App., p. 26b). Thus, the doctrine of primary jurisdiction should be applied by this Court to conclude that the trial court properly dismissed Appellants' Complaint because the Commissioner was scheduled to conduct a review of the Ambulatory Surgery Facilities Provider Class Plan at issue in this case.

III. The Appellants Did Not Have a Clear Legal Right to a Cease And Desist Order, And the Commissioner Did Not Have a Clear Legal Duty to Issue a Cease and Desist Order to BCBSM.

A. Standard of Review

This Court reviews a trial court's decision regarding whether to issue a writ of mandamus based upon whether the trial court abused its discretion. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

B. The Appellants were not entitled to mandamus.

The Appellants requested the trial court to “. . . force the Commissioner to issue a Cease and Desist Order that enjoins BCBSM from using evidence of need (‘EON’) criteria . . .” and to issue a judgment that as a matter of law “. . . the Commissioner had the duty and authority to issue a Cease and Desist Order to enjoin *ultra vires* and illegal BCBSM conduct” (App., pp. 563a, ¶ 20 and 578a-579a, ¶¶ B and C). The Court of Appeals correctly analyzed the Appellants' Complaint as a request for mandamus. However, the Appellants failed to establish the criteria necessary for the trial court to issue such a mandatory order. As a result, the Court of Appeals was correct in affirming the trial court’s dismissal of Appellants’ Complaint.

This Court has set forth the requirements for the issuance of mandamus as follows:

A writ of mandamus will only be issued if the plaintiffs prove they have a 'clear legal right to performance of the specific duty sought to be compelled' and that the defendant has a 'clear legal duty to perform such act" [*In re MCI, supra*, pp. 442-443]

See also *Foote Hospital v Public Health Dept*, 210 Mich App 516, 525-526; 534 NW2d 206 (1995), app den 451 Mich 877; 549 NW2d 571.

The Appellants have failed to prove that they have a clear legal right to have a Court force the Commissioner to issue a cease and desist order to stop BCBSM's use of its EON standard in its Ambulatory Surgery Facilities Provider Class Plan. The Appellants have failed to cite any statute which gives them such a legal right. MCL 550.1101 *et seq* does not give the Commissioner the authority to issue a cease and desist order in such a situation. The only

section that gives the Commissioner the right to issue a cease and desist order is MCL 550.1402(9) which provides that the Commissioner may issue such an order if he determines that BCBSM has failed to properly pay subscriber claims. (App. p. 18b). This section of the statute does not relate at all to BCBSM's use of an EON standard. The grant of this right in MCL 550.1402(9) establishes that the legislature did not give the Commissioner cease and desist authority against BCBSM in any other context under the maxim *expressio unis est exclusio alterius* – the expression of one thing excludes other similar things. *Sebewaing Industries, Inc v Village of Sebewaing*, 337 Mich 530, 545-546; 60 NW2d 444 (1953). In any event, the issuance of a cease and desist order is a discretionary decision, not a ministerial decision. Thus, mandamus is not appropriate. *Foote Hospital, supra*, pp. 525-526.

Appellants apparently are contending that BCBSM has an obligation under 1980 PA 350 to enter into a participating agreement with Blakewoods as a freestanding ambulatory surgery facility. However, there is no provision in MCL 550.1101 *et seq* that gives the Commissioner the authority or duty to require BCBSM to enter into a participating agreement with Blakewoods. In fact, MCL 550.1502(1) is permissive in that it states that BCBSM "may" enter into a participating agreement with a health care facility where it states:

(1) A health care corporation subject to this act may enter into contracts with health care facilities. [App. p. 18b]. (emphasis added)

Because BCBSM has no obligation to enter into a Participating Agreement with Blakewoods, the Commissioner has no clear legal duty to issue a Cease and Desist Order to require BCBSM to enter into such a participating agreement. Thus, the Appellants fail to meet the second requirement for the issuance of mandamus.

The Office of the Commissioner of Insurance was established by MCL 500.202. As a creature of the Legislature, the Commissioner only possesses " . . . that authority specifically

granted by statute." See *Booth v Consumers Power Company*, 226 Mich App 368, 373; 573 NW2d 333 (1997) requires the Commissioner to regulate BCBSM, he is only allowed to regulate BCBSM ". . . as provided in this Act." (App., p. 26b). Since there is no provision in MCL 550.1101 *et seq* which requires the Commissioner to issue a Cease and Desist Order to BCBSM that would require BCBSM to enter into a participating agreement with Blakewoods, the Commissioner has no legal duty to issue such an order. While MCL 550.1619(3) (App. p. 27b) gave the Appellants the right to file this suit, it did not give the court the authority to issue a writ of mandamus absent the requirements set forth in *In re MCI*, *supra*, pp. 442-443, being met. Appellants have failed to cite any case law which supports their position that they are not required to meet the conditions set forth in *In re MCI*, *supra*, pp. 442-443. Since Appellants have done nothing to support their argument, they have abandoned it. See *Micham*, *supra*, p. 203, *Holtzlander*, *supra*, p. 725 and *Isagholian*, *supra*, p. 14.

In *Genesis v Commissioner*, *supra*, p. 535, the Plaintiffs sought the issuance of a cease and desist order. The Court affirmed the Trial Court's denial of such a request holding:

Mandamus is an extraordinary remedy and an inappropriate tool to control a public official's or an administrative body's exercise of discretion. *W A Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 525-526; 534 NW2d 206 (1995). Such a writ is properly granted only when, for all practical purposes, there is no other remedy that might achieve the same result. *McDonald's Corp v Canton Twp*, 177 Mich App 153; 441 NW2d 37 (1989). Because the commissioner had no clear legal duty under the NHCCRA to issue a cease and desist order and because the statutory review proceedings present an alternate and adequate remedy, resort to mandamus would have been inappropriate. The Trial Court appropriately granted summary disposition. [*Id*, p 546]

Likewise in the instant matter, this Court should affirm the Court of Appeals denial of a writ of mandamus.

IV. This Appeal is Moot.

A. Standard of Review

This issue was not reached below but should be reached by this Court to support dismissal.

B. BCBSM's presently effective Ambulatory Surgery Facilities Provider Class Plan has a totally different EON Standard than was included in its earlier plan.

The complaint sought "...declaratory and injunctive relief to force the Commissioner to issue a cease and desist order that enjoins BCBSM from using evidence of need (EON) criteria..." (App., p. 563a, ¶ 20) However, this issue is now moot because BCBSM's modified Ambulatory Surgery Facility Provider Class Plan, now effective as a result of the Commissioners orders of March 29, 2001 and January 31, 2002, no longer contains the same EON standard. Thus, this Court should refuse to address this issue.

In *East Grand Rapids School District v Kent County*, 415 Mich 381, 390; 330 NW2d 7 (1982), this court concluded:

A case is moot when it presents "nothing but abstract questions of law which do not rest upon existing facts or rights". *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920).

The Ambulatory Surgery Facilities Provider Class Plan in effect at the time that the Appellants filed their complaint stated, in part, as follows:

Evidence of Necessity. In an effort to determine whether there is a need for additional ambulatory surgery services in a service area, Blue Cross Blue Shield of Michigan requires that Evidence of Necessity be demonstrated by: (a) meeting all state planning requirements (e.g., Certificate of Need), when applicable, and (b) determination by BCBSM that the proposal for an Ambulatory Surgery Facility is consistent with established planning criteria. Final determination concerning evidence of necessity is made by Blue Cross Blue Shield of Michigan. [App., p. 45b]

This language gave BCBSM discretion to determine whether it "needed" to participate with any particular ambulatory surgery facility. The Commissioner found that this plan:

[S]hows the degree of subjectivity that BCBSM applies to the EON and demonstrates that the EON is simply not a rigid arithmetic formula but rather one subject to manipulation. An easily manipulated standard is not a reasonable standard. [App., p. 148a]

As a result, the Commissioner concluded:

BCBSM does not use reasonable standards in applying EON criteria, nor does it apply them consistently which acts to limit access for BCBSM members. . . . The EON criteria are almost impossible for non-hospital owned ASFs to meet. BCBSM calculates EON by using all operating rooms and all procedures in a county. Hospitals are allowed to add operating rooms without meeting EON. Hospitals are also allowed to transfer operating rooms to outpatient facilities, which acts to dilute the need for operating rooms within the service area. [App., p. 152a]

Therefore, BCBSM was required to rewrite its Ambulatory Surgery Facilities Provider Class Plan. (App., p. 169a)

BCBSM did rewrite its Plan and the Commissioner approved it in his order of March 29, 2001 (App., pp. 185a-193a). This Remedial Plan contained an EON that required each facility that wished to participate with BCBSM to have performed no more than 900 surgeries per operating room per year (1,200 surgeries less 25%, App., p. 203a, 205a). Once allowed to participate, each facility had to perform 1200 surgeries per operating room per year. (App., pp. 202a-206a). The Commissioner found that such standards cured the deficiencies in BCBSM's former plan:

The March determination report identified as the main access deficiencies BCBSM's failure to use reasonable standards in applying its evidence of need (EON) criteria and its failure to apply the EON standards uniformly. BCBSM has substantially overcome these deficiencies in the rewritten plan by completely rewriting the EON standards, called qualification standards in the remedial plan, and by providing for transition periods in the application of these standards for both currently participating and nonparticipating providers that will begin "leveling the playing field" during the current year. . . . [App., p. 188a]

The Commissioner approved the qualification standards in the Remedial Ambulatory Surgery Facilities Provider Class Plan again in his order of January 31, 2002. (App., pp. 84b-92b). As a result, the new EON standards have been effective since the Commissioner's order of March 29, 2001. Blakewoods met these EON standards and began participating with BCBSM on October 9, 2001. (Appellants' Brief, pp. 11-12) Thus, the EON standard in effect at the time that Appellants' filed their complaint is no longer in effect. As a result, this Court should not reverse the Trial Court and the Court of Appeals decision, which dismissed the complaint, in order to review an EON standard that is no longer in effect. That issue is moot.

C. Blakewoods has a participating agreement with Blue Cross Blue Shield of Michigan.

Paragraph E of the Appellants' Prayer for Relief requests this Court to hold that the Commissioner must require BCBSM to provide reimbursement for services performed by a provider either through a participation agreement with Blakewoods or to subscribers. Blakewoods already participates with BCBSM and receives reimbursement from BCBSM (Appellants' Brief, pp. 11-12 and 34-35). As a result this issue is moot. Therefore this Court should affirm the Court of Appeals decision on this basis.

As noted above, a case is moot when it presents nothing but abstract questions that do not rest on existing facts. *East Grand Rapids School District, supra*, p. 390. Since Blakewoods now participates with BCBSM, there is no controversy between Blakewoods and the Commissioner over whether Blakewoods should get reimbursed by BCBSM. Moreover, there is no need for this Court to consider whether to order the Commissioner to order BCBSM to reimburse BCBSM since BCBSM is doing that now under its participation agreement with Blakewoods. Thus, this issue is moot and this Court should affirm the Court of Appeals decision on this basis.

V. The Appellants' Challenge to Blue Cross Blue Shield's EON Standard in its Ambulatory Surgery Facilities Provider Class Plan is Barred by the Doctrines of *Res Judicata* and Collateral Estoppel.

A. Standard of Review

This issue was not reached below but should be reached by this Court to support dismissal.

B. The Appellants' claim is barred by the doctrine of *res judicata* and collateral estoppel.

In an order dated March 30, 2000, the Commissioner found that BCBSM could have an EON standard in its Ambulatory Surgery Facilities Provider Class Plan. (App., p. 153a). The Appellants appealed that decision pursuant to MCL 550.1515(2). In an Order dated November 29, 2000, Independent Hearing Officer James K. Nichols affirmed the Commissioner's decision. (App., p. 82b.) The Appellants did not appeal that decision although they could have done so pursuant to MCL 550.1518 and *In re Provider Class Plan*, *supra*, at 716. Thus the Order was final and binding. *In re MCI*, *supra*, at 428-429. Therefore, under the doctrines of *re judicata* and collateral estoppel, Appellants may not raise this issue in this case.

While criticizing BCBSM's application of the EON criteria, the Commissioner rejected Appellants' arguments and embraced the concept of EON in his March 30, 2000 Order:

BCBSM should establish reasonable EON guidelines that will be applied uniformly throughout the state. . . However, new EON guidelines need not act to allow any and all ASFs to participate. BCBSM is justified in keeping a needs based formula, however, this formula should be applied reasonably and uniformly for all providers. . . In computing EON, there should be a minimum number of procedures performed per room (e.g. 1200) . . . In order to be eligible to participate with BCBSM, an ASF should be able to demonstrate that it is currently performing at least 900 cases a room per year for non-BCBSM subscribers. . ." (App., p. 153a)

On May 1, 2000, Petitioner filed an appeal of the Commissioner's March 30, 2000 Order, requesting a contested case hearing under the Administrative Procedure Act before an

Independent Hearing Officer (IHO), as provided by MCL 550.1515(1). (App., p. 80b). *In Re Provider Class Plan, supra*, 714-716.

In an Order dated November 29, 2000, IHO James K. Nichols affirmed the Commissioner's Order of March 30, 2000, finding that the Commissioner properly concluded that BCBSM could have reasonable EON standards applicable to all ambulatory surgery facilities that wanted to participate with BCBSM. IHO Nichols also concluded that the Commissioner correctly decided that BCBSM did not need to reimburse or participate with every ambulatory surgery facility. Finally, IHO Nichol affirmed the Commissioner's determination that BCBSM was required to rewrite the Plan so that the EON standards would be reasonable and all licensed ASFs would have an equal opportunity to participate with BCBSM. (App., pp. 81b-82b).

In his Order, the IHO stated that:

6. On May 1, 2000 Petitioners filed their 'Joint Petition for Review'. . . The Petitioners also alleged that the Plan was *ultra vires* because it provided that Ambulatory Surgical Facilities had to meet an Evidence of Need standard established by BCBSM. Finally, Petitioners alleged that BCBSM failed to recognize the Petitioner's license.

* * *

12. The issues raised by Petitioners in their Joint Petition for review are legal issues which are exclusively within the authority of the IHO. Therefore, no testimony need be taken to resolve those legal questions.

* * *

15. The Commissioner properly concluded that BCBSM could have reasonable Evidence of Need standards applicable to all licensed Ambulatory Surgical Facilities who wish to participate with it. . .

16. The Commissioner correctly decided that BCBSM need not reimburse every licensed Ambulatory Facility. BCBSM is not required to participate with every licensee. . . .

* * *

18. Thus, the issues raised by Petitioners . . . are legal issues which the Commissioner properly resolved in his Decision of March 30, 2000. [App., pp. 80b-82b]

In the instant matter the Appellants are raising the same issues which IHO Nichols already decided. Specifically, Statement of Question, Number 1 asks whether an EON is a reasonable standard which BCBSM may set as a criterion for participating providers. In addition, paragraph D of the Appellants' requested relief on p. 60 of their Brief asks this Court to compel the Commissioner to prohibit BCBSM's use of EON.

The Supreme Court has defined the elements of *res judicata* as follows:

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. [Citation deleted.] A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.*, at 375-376

Michigan courts have broadly applied the doctrine of *res judicata*. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 875 (1995). [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999)].

The doctrine of *res judicata* also applies to a final order issued in an administrative matter. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 380; 521 NW2d 531 (1994) and *Energy Reserves v Consumers Power*, 221 Mich App 210, 216-217; 561 NW2d 854 (1997). It also applies even with regard to a case that is pending appeal. *City of Troy v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970) and Restatement of Judgments 2d, § 13, p 135.

The Supreme Court has defined the elements of collateral estoppel as follows:

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. [Footnote deleted.] [*People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990)].

The Court of Appeals has set forth the purpose of collateral estoppel as follows:

Collateral estoppel is designed to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication. [*Eaton County Board of County Road Commissioners v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994)].

In the instant matter, IHO Nichols decided on the merits the issue of whether BCBSM could have EON as a criterion for participation. The Appellants and the Commissioner were parties in the proceeding before IHO Nichols. Thus, the doctrine of *res judicata* bars the Appellants from raising this issue before this Court. Moreover, the appellants are barred from raising this issue under the doctrine of collateral estoppel as well because the issue was actually litigated by the same parties. Thus, this Court should affirm the Court of Appeals decision on this basis.

VI. This Court Should not Consider Whether BCBSM May Refuse to Reimburse a Member or Subscriber for Covered Services Lawfully Rendered by a Non-participating Licensed Provider Because This Issue was not Raised in Appellants' Application for Leave to Appeal.

A. Standard of Review

This issue was not reached below but should be reached by this Court to support dismissal.

B. Unless ordered by the court, MCR 7.302(F)(4) prohibits review of this issue.

The Appellants' Application for Leave to Appeal raised four questions. (App., p. 83b). None of these questions raised as an issue whether BCBSM may refuse to pay a member or subscriber for covered services lawfully rendered by a non-participating licensed provider. Thus, pursuant to MCR 7.302(F)(4), unless otherwise ordered, this Court may not consider this issue.

MCR 7.302(F)(4) provides that:

Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal.

In *O'Connor v Insurance Commissioner*, 236 Mich App 665; 601 NW2d 168 (1999), O'Connor attempted, on appeal, to raise the commissioner's failure to issue a decision timely as a reason for reversal. However, the Court held that O'Connor did not raise this issue in his Application for Leave to Appeal. Moreover, the trial court had declined to review this issue. As a result, the Court refused to consider that issue. *Id*, p. 673.

In the instant matter the Appellants did not raise in their application for leave to appeal to this Court the issue of whether BCBSM should have to pay a member or subscriber when services are provided by a non-participating licensed provider. Moreover, neither the trial court nor the Court of Appeals addressed this issue. Thus, this Court should refuse to address it.

The Appellants contend that BCBSM ". . . cannot refuse to provide reimbursement for services lawfully rendered by non-participating providers as long as these services are within the scope of the coverage plan or certificate. . . ." (Appellants' Brief, p. 33). Here the key phrase is whether the service is within the plan or certificate.¹⁰ The Appellants have failed to cite to any plan or certificate that requires BCBSM to pay a subscriber for services rendered by an ambulatory facility that does not participate with BCBSM. Without such evidence, there is no basis for this Court to conclude that BCBSM must pay a subscriber if the ambulatory surgery facility does not participate.

Appellants contend that several Attorney General opinions support their position that BCBSM must pay BCBSM subscribers for services rendered by Blakewoods. (Appellants' Brief, p. 41). However, the Appellants concede that their position is premised on the assumption that ". . . BCBSM's certificates and plans cover outpatient surgical service. . . ." (Appellants' Brief, p. 41). Because Appellants have not cited to any record evidence of a certificate or plan

¹⁰ MCL 550.1401(2) allows BCBSM to ". . . limit health care benefits that it will furnish. . . ." Even Appellants acknowledge that "BCBSM may determine which benefits it will establish for coverage of specific health care services." (Appellants' Brief, p. 42).

covering outpatient surgical services, there is no evidence to support their position. Further, OAG, 1993-1994, No. 6809, pp 170, 171 (June 30, 1994) specifically states that the Attorney General's opinion is premised on the assumption "that if Blue Cross Blue Shield of Michigan covers physical therapy in a certificate . . . it must pay" Therefore, the Attorney General opinions do not support Appellants' position, but support the position of the Commissioner. See also, OAG, 1985-1986, No 6410, pp 447, 448 (December 22, 1986); OAG, 1989-1990, No 6567, pp 46, 49 (February 1, 1989); and OAG, 1989-1990, No 6621, pp 179, 181 (July 13, 1989).

Appellants also contend that MCL 550.1502(2) and (3) requires BCBSM to make payments. (Appellants' Brief, pp. 45-46). They provide, in pertinent part, as follows:

(2) A contract entered into pursuant to Subsection 1 shall provide that the private provider-patient relationship shall be maintained to the extent provided for by law. . . .

(3) A health care corporation shall not restrict the methods of diagnosis or treatment of professional health care providers who treat members. Except as otherwise provided in Section 502a, each member of the health care corporation shall at all times have a choice of professional health care providers. This subsection shall not apply to limitations in benefits contained in certificates, to the reimbursement provisions of a provider contract or reimbursement arrangement, or to standards set by the corporation for all contracting providers (App., p. 19b).

MCL 550.1502(1), the "Subsection 1" referred to in the above quotation, states, in part, as follows:

A health care corporation may enter into participating contracts for reimbursement with professional health care providers practicing legally in this state for health care services that the professional health care providers may legally perform (App., p. 18b)

MCL 550.1105(4) defines health care provider to mean a health care facility, a person licensed under MCL 333.16101 to MCL 333.18237, and any other person or facility with the approval of the Commissioner " . . . who or which meets the standards set by the health care corporation for all contracting providers;" (App., p. 12b). Thus subsection 1 allows

BCBSM to enter into the participating contract referred to in MCL 550.1504 with the Appellants. However, since that statute is permissive, it does not require BCBSM to enter into such participating contract with Appellants. MCL 550.1502(2) simply says that if BCBSM enters into a contract with Appellants, that the doctor-patient relationship shall be maintained to the extent allowed by law.

Appellants seem to rely on the second sentence of Subsection 3 of Section 502 where it states that each member of a health care corporation shall at all times have a choice of professional health care providers. (App., p. 19b). However, the third sentence of subsection 3 states that this subsection does not apply to limitations in benefits contained in certificates or to the reimbursement provisions of a provider contract or reimbursement arrangement. In *Cowan v BCBSM*, 166 Mich App 568, 571; 421 NW2d 243 (1988), the Court of Appeals reviewed this language and held that:

To a great extent, the third sentence of § 502(3) takes away what the first purports to grant and commits the scope of defendant's coverage obligations to the hands of the contracting parties.

Page 6 of BCBSM's Ambulatory Surgery Provider Class Plan limits reimbursement only to situations where the provider participates. (App., p. 200a). Since subscribers' benefits are limited by BCBSM's Ambulatory Surgery Facilities Provider Class Plan, the second sentence of MCL 550.1502(3) does not require BCBSM to give subscribers a choice of professional health care providers. Thus, this section does not support Appellants' position.

VII. The Appellants do not Have Standing to Raise as an Issue Whether BCBSM Should be Required to Pay a Member or Subscriber who Receives Covered Services From a Licensed Non-participating Provider.

A. Standard of Review

This issue was not reached below but should be reached by this Court to support dismissal.

B. The Appellants lack standing to proceed.

The Appellants have not alleged that any of them is a member or subscriber of BCBSM who has been refused reimbursement for covered services lawfully rendered by a non-participating provider. While the Complaint alleged that certain individuals had not been reimbursed, none of those individuals are included as Appellants. Thus, the existing Appellants do not have standing to raise this issue in this Court.

According to this Court:

Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. [*House Speaker v State Administrative Bd.*, 441 Mich 547, 554; 495 NW2d 539 (1993).]

And, quoting with approval from 59 Am Jur 2d, Parties, § 30, p. 414:

[O]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as "standing". . . [*Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1972)]

See also *Detroit Fire Fighters v Detroit*, 449 Mich 629, 633-638; 537 NW2d 436 (1995).

Here the Appellants' interest will not be affected in a manner different from the citizenry at large if BCBSM were required to pay subscribers who receive services performed by non-participating providers. Blakewoods is the only Appellant which is an ambulatory surgery facility and it participates with BCBSM. (Appellants' Brief, pp. 11-12). Moreover, the Appellants do not have a legal or equitable right, title, or interest in whether BCBSM pays such subscribers. Thus, the Appellants lack standing to raise this issue. As a result, this Court should refuse to consider this issue, and should instead affirm the Court of Appeals decision on this basis.

CONCLUSION

MCL 550.1502(8), and various other sections of the law that regulates BCBSM, allow BCBSM to have reasonable standards to apply to those who wish to participate with it. BCBSM's EON standard in its presently effective Ambulatory Surgery Facilities Provider Class Plan is reasonable because it is the same standard that Blakewoods and other similar facilities are required to meet in order to receive their CON from the Department of Community Health. Moreover, the EON is consistent with BCBSM's statutory obligation of providing access to health care services to its subscribers and keeping health care costs from rising.

The Trial Court lacked jurisdiction to issue a declaratory judgment since no actual controversy existed because MCL 550.1509 *et seq*; MSA 24.660(509) *et seq*, provided the Appellants with a remedy to guide their future conduct in order to preserve their legal rights. In addition, Appellants did not exhaust this exclusive remedy prior to filing their complaint. Thus, the Trial Court correctly granted the Commissioner's Motion for Summary Disposition and the Court of Appeals properly affirmed.

The Commissioner had no legal duty to issue a cease and desist order to BCBSM and the Appellants did not have a clear legal right to the discharge of such duty because 1980 PA 350 does not impose such a duty on the Commissioner. Even if the Commissioner had such a duty, it was a discretionary one. Thus, the Trial Court correctly denied Appellants' request for mandamus and the Court of Appeals properly affirmed.

Various provisions in 1980 PA 350 give BCBSM the ability to establish reasonable standards to apply to all ambulatory surgery facilities that wish to enter into a participating agreement with it. These standards were incorporated in the Ambulatory Surgery Facilities Provider Class Plan filed by BCBSM which was reviewed by the Commissioner. Such review is exclusively within the authority of the Commissioner who determined that BCBSM could have

such reasonable standards. Since the Appellants had input in that review process even to the point of asking review of the Commissioner's decision, there is no need for this Court to interrupt that process on the basis of the allegations in the Complaint.

Appellants request this Court to decide whether BCBSM may use the EON standard in its Ambulatory Surgery Facilities Provider Class Plan in effect when they filed their Complaint in 1998 to restrict Blakewoods' participation with BCBSM. That EON standard is no longer in use. Moreover, BCBSM does participate with Blakewoods. Thus, these issues are moot.

The Appellants failed to raise in their Application for Leave to Appeal to this Court whether BCBSM has an obligation to reimburse subscribers who have services performed by non-participating providers. Moreover, there is no evidence in the record in this case which requires BCBSM to pay such reimbursement. As a result, this Court should not address this issue.

Appellants argue that BCBSM cannot have an EON standard in its Ambulatory Surgery Facilities Provider Class Plan. However, the IHO held that BCBSM could do so and the Appellants did not appeal the IHO's decision even though they could have done so pursuant to MCL 550.1518. Thus, under the doctrine of *res judicata* and collateral estoppel, the Appellants are barred from having this Court decide this issue.

Finally, the Appellants lack standing to raise as an issue whether BCBSM has an obligation to reimburse subscribers who have services performed by non-participating providers. As a result, this Court should not consider this issue.

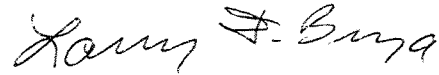
RELIEF SOUGHT

Wherefore, the Defendant-Appellee Commissioner of Financial and Insurance Services requests this Honorable Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Larry F. Brya".

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